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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 228

WILLIAM R. BROWN,

Petitioner,

vs.

VINCENT O'BRIEN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

OPINION BELOW.

The opinion of the Supreme Court of Illinois appears in the record at page 58. It is reported as *O'Brien* v. *Brown*, 403 Ill. 183.

STATEMENT OF THE CASE.

Many material facts which led to the overpayment in question are omitted in petitioner's statement of the case.

Respondent and his family had occupied the premises in question as their home, since September, 1941, under the leases mentioned in the petition (R. 18), the last of which

expired by its terms September 30, 1945 (R. 30). These leases called for a rent of $125 per month.

In August of 1945 petitioner announced that he would not renew the lease since he intended to offer the premises for sale (R. 25). In remitting the rent for September, 1945, respondent wrote petitioner as follows:

> "Enclosed is check for the September rent. I understood in our conversation, before you left for your vacation, that you do not wish to renew the lease. It will take us sometime to decide what to do and, in the meantime, rent for October will be due. Since acceptance of the October rent would, in the absence of some understanding to the contrary, amount to a renewal of the lease, it may be understood that no renewal will thereby be effected, but that any possession after September 30th shall be on a month to month basis. I should appreciate it if you will confirm that understanding if it meets with your approval." (R. 25.)

Petitioner, however, insisted upon possession by September 30, 1945, and, as stated in his petition, thereafter refused all tenders of rent for the months of October, 1945 to May, 1946, which respondent made to avoid any legal basis for eviction. Each tender was accompanied by a letter from respondent stating that respondent's retention of possession "was pursuant to O. P. A. Regulations and the law as related thereto as would be your acceptance of the rent above mentioned" (R. 19).

During September of 1945, respondent succeeded in finding and buying a home but could not move in because the Office of Price Administration permitted a tenant then in possession to remain until April 30, 1946 (R. 26).

At all times in question, there were in effect and operative in Chicago, Illinois, Sections 6(a) and 6(b) of Rent Regulations for Housing, promulgated by the Administrator pursuant to the authority of the Emergency Price Control Act. Their validity has not been questioned in the

case at bar and has been upheld by the Emergency Court of Appeals.

Section 6(a) prohibited the removal or eviction of a tenant notwithstanding the expiration of his lease so long as he paid the rent to which his landlord was entitled, except in certain specified instances not here involved. Section 6(b) provided that before proceeding in any other case the landlord must obtain the Administrator's approval by receiving an O. P. A. certificate.

There is no evidence that petitioner ever procured a purchaser or of any occurrence which would entitle him to such a certificate. Admittedly, he never at any time, for any reason, procured such certificate. He did file a petition therefor which he withdrew later before O. P. A. had acted thereon (R. 22).

In defiance of the Regulations, petitioner commenced an aggressive series of actions to compel respondent to move and to pay rent in excess of the ceiling for his continued and lawful use and occupancy of the premises. Among such actions, were two forcible entry and detainer suits brought by petitioner in the Municipal Court of Chicago. In the first, the court entered judgment against petitioner and in the second petitioner took a non suit (R. 22).

At the same time, petitioner had pending a separate suit for the recovery of "liquidated damages" on account of respondent's allegedly wrongful retention of possession (R. 22). That suit was based on a clause of the lease providing for liquidated damages of $10 a day for withholding possession after expiration thereof. When, in that suit, the trial court ruled against petitioner on the ground that Federal law nullified the lease provision declared upon, as calling for rent in excess of the ceiling, petitioner persisted in his demand by perfecting an appeal, and by filing the printed record and his brief (R. 23).

In connection with these proceedings, respondent was compelled to and did retain counsel, and had been and was being subjected to substantial expense for reporters and attorneys' fees, printing bills and other expenses of suit, for which reimbursement could not be had in those proceedings. In an effort to avoid further expense and to have the demands of his landlord determined in a forum in which reimbursement might be had, respondent, before his briefs were due on said appeal, paid petitioner's claim under protest, and in so doing told petitioner that he did not thereby admit its validity but on the contrary reserved all rights available to him under the Emergency Price Control Act and the Price Control Extension Act (R. 21, 26). This is shown by the following statement in respondent's letter accompanying the payment, omitted from the portion quoted by petitioner at page 3 of his petition:

> "In making this tender I do not admit the validity or legality of your claim. I reserve any and all rights which I may have. More specifically and without limiting the foregoing, I reserve any and all rights which I may have by virtue of this tender and payment under the Emergency Price Control Act of 1942, as amended, and the Price Control Extension Act of 1946."

Thereafter the appeal was dismissed as moot on respondent's motion, but only after he was obliged to file his brief and to have the case orally argued, for the Appellate Court took the motion with the case (R. 46).

At the trial in this proceeding there was no dispute in facts. The trial court thus directed the jury to return a verdict instructing them to find an overcharge of rent in the sum of $1,320. Thereafter the court entered judgment for three times that amount or $3,960 and for $500 attorneys' fees (R. 12).

As to petitioner's statement of subsequent occurrences, respondent amplifies as follows:

1. Petitioner's claim of unconstitutionality of the Emergency Price Control Act was limited to the contention that said Act impaired his right of jury trial contrary to the Constitutions of the United States and the State of Illinois (R. 3, 9, 17).

2. Petitioner did not plead, prove, or even contend that his violation of the Regulations was not willful within the meaning of Section 925(e) so as to limit the judgment to the amount of the overcharge.

3. Contrary to petitioner's assertions at page 5 of the petition, the Supreme Court of Illinois expressly passed upon the points which petitioner says it dismissed without decision or discussion (R. 63-65).

ARGUMENT.

Speaking generally of the six grounds on which the Court is asked to take this case, we assert without need for amplification that none of them falls within the situations contemplated by Subsection 5 of Rule 38 of this Court. We discuss them specifically in the order in which they appear in the petition.

I.

The Question of Unconstitutional Deprivation of the Right of Jury Trial Is Not Before the Court.

The only constitutional point raised and preserved by petitioner is that the Emergency Price Control Act is unconstitutional in that it deprived him of the right of trial by jury in violation of the Seventh Amendment of the Constitution of the United States and of Article II, Section 5 of the Constitution of the State of Illinois (R. 3, 9, 17). If his contention is sound, there is no court, either Federal or State, in which the Act may be so enforced if the defendant demands a jury trial.

Since the Seventh Amendment to the Constitution of the United States is a limitation on the Federal courts and not on the State courts, and since the case at bar was brought and tried in an Illinois court, the Seventh Amendment is wholly inapplicable. *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 34. This is true even though the suit was brought for the enforcement of a Federal statute. *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, 217, 219. See also: L. R. A. 1917A, 91, 92.

In *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211,

this Court, in a suit in a State court under the Federal Employers' Liability Act, affirmed a judgment based on a verdict which was not unanimous but which was legal under the law of the State. In so doing, this Court held that although the Seventh Amendment "exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict", there was no violation of the Seventh Amendment because it did not "apply to the action of the State legislature and to the conduct of the State court in enforcing at the trial the law of the State as to what was necessary to constitute a verdict."

The case of *Dimick* v. *Schiedt,* 293 U. S. 474, 79 L. Ed. 603, relied upon at page 15 of the petition, is beside the point, since the proceedings there reviewed were not brought in a State court but in the United States District Court.

What we have said is a sufficient answer to petitioner's contention that he was deprived of the right to trial by jury contrary to the Seventh Amendment. Petitioner does not here claim that he was deprived of a right to trial by jury contrary to the Illinois Constitution (see Questions Presented, petition page 7). Manifestly, such contention, if made, would not be reviewable on this record because the decisions of the Supreme Court of Illinois are conclusive on the question of what constitutes a trial by jury within the meaning of the Illinois Constitution.

On the merits of that question, however, the Supreme Court of Illinois was correct. As shown by its opinion, it has been held many times that the assessment of damages is not a trial according to the common law and is not within the guarantee of a jury trial provided by the Illinois Constitution, but is a mere inquest of office which may be performed by a sheriff or other officer. Indeed, in that respect the rule in the Federal Courts, under the Seventh Amendment is no different.

Petitioner contends otherwise, and, at page 9 of the petition, relies on *Dimick* v. *Schiedt*, 293 U. S. 474, 79 L. Ed. 603, to support his contention that the Federal courts may not "increase" damages awarded by a jury. In that case, however, this Court merely held that historically the verdict of a jury in a tort suit for unliquidated damages could not be increased by the court, but this Court expressly distinguished between tort actions for unliquidated damages and other actions in which the damages are certain or liquidated. As to the latter, such as in the case at bar, the historical authority of the trial court to increase or abridge the verdict of the jury according to the practices of the common law was expressly recognized in that decision.

Moreover, as said in *Shearer* v. *Porter*, 155 Fed. (2d) 77, at page 81, in reviewing the judgment of a United States District Court:

> "The Seventh Amendment is not a guarantee that such discretionary increasing of compensatory damages as a statute may authorize for exemplary or other public-interest purposes shall be done by a jury. The historic function of a jury is to determine issues of fact. * * * Compensatory damage traditionally is an issue of fact, but the discretionary increasing of such damages is not."

See also: *Teese* v. *Huntingdon*, 64 U. S. 2; *Birdsall* v. *Coolidge*, 93 U. S. 64.

In point of fact, on the record in this case, the trial court did not assess the damages. The jury, as directed by the trial court, brought in a verdict for the amount of the overcharge. The trial court later entered judgment for three times that amount. But even if the trial court "assessed" or "increased" the damages, as petitioner asserts, he was not thereby deprived of his right to a trial by jury as that right existed at common law and as

that right is protected by either the Federal or State Constitution. Under both Federal and State decisions the discretionary increasing of damages never has been a function of a jury and is not within the protection of the constitutional guarantees.

In any event, on the record in this case, there was no question of fact and therefore there could be no deprivation of a jury trial. The amount of the overcharge was not in question. Neither was any other fact. Only questions of law, as to whether there was any overcharge and as to how much the recovery should be, were presented The historical role of a jury is to resolve questions of fact. Thus, in a case where none is presented, there can be no claim of denial of a jury trial.

The disposition by the court of matters involving no question of fact, on the pleadings, or by motion for summary judgment, or for a directed verdict, or otherwise, is not a deprivation of right to trial by jury either under the decisions of this Court or those of the State of Illinois. *Galloway* v. *U. S.*, 63 S. Ct. 1077, 1086; *Lyon* v. *Mutual Benefit Health & Accident Assn.*, 59 S. Ct. 297, 300; *Brady* v. *So. Ry. Co.*, 64 S. Ct. 232, 234; *Fidelity & Deposit Co.* v. *U. S.*, 187 U. S. 315; *Diversey Liquidating Corporation* v. *Neunkirchen*, 370 Ill. 523, 527; 19 N. E. (2d) 363; *Corcoran* v. *City of Chicago*, 373 Ill. 567, 579; 27 N. E. (2d) 451.

We, therefore, respectfully submit that the first reason relied upon by petitioner for allowance of a writ is without merit.

II.

Congress Has the Power to Regulate the Practice in State Courts in Suits for the Enforcement of a Federal Statute, and to Authorize Them to Give Judgment for Three Times the Compensatory Damages Awarded by a Jury.

Under this point we answer petitioner's points VII and VIII.

It is apparent from the opinion of the Illinois Supreme Court that to the extent, if any, which the Emergency Price Control Act purports to enable courts to "assess" damages, it confers no power and establishes no procedure which was not already in effect in the courts of Illinois.

But conceding for the argument petitioner's contention that the statute does provide a new procedure in so far as Illinois is concerned, and that the court rather than the jury did assess the damages, we deny his assertion that the holding by the Supreme Court that Congress may regulate the practice in State courts presents "a Federal question of substance not theretofore determined by this Court." In *Teste and Fleming* v. *Katt,* 330 U. S. 386, 91 L. Ed. 967, 67 S. Ct. 810, this Court held that since the Price Control Act was made under authority of the Federal Constitution, it is part of the supreme law of the land, binding on the judges in every State "anything in the Constitution or laws of any State to the contrary notwithstanding." At page 813 of the Supreme Court Reporter citation, this Court said:

> "that the obligation of States to enforce these Federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."

And at page 814:

> "When Congress, in the exercise of the power con-

fided to it by the Constitution, adopted that Act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own legislature, and should be respected accordingly in the courts of the State."

In *Regan* v. *Kroger Grocer and Baking Co.*, 386 Ill. 284, 299, 54 N. E. (2d) 210, and again in the case at bar, the Supreme Court of Illinois expressly held that Congress has power not only to confer jurisdiction on State courts but to "regulate procedure in State courts in the enforcement of Federal laws." In so doing, it, too, primarily relied upon Article VI of the Federal Constitution and also upon decisions of New York and Wisconsin to the same effect.

It is, therefore, submitted that the power of Congress to regulate the procedure in State courts in proceedings for the enforcement of Federal laws is not open to question.

It is true that the State court in which the action for enforcement is brought must be one of competent jurisdiction. It must have the power to hear and determine cases of the general class to which the action belongs. The Superior Court of Cook County in which the case was tried is one of general and unlimited jurisdiction. It is likewise true that, while Congress may confer jurisdiction on such a court to hear cases for the enforcement of Federal laws, its fundamental powers and jurisdiction, as petitioner contends, are derived from the State Constitution and Statutes.* But this is not to say, as petitioner does, that the *procedure* to be employed in the exer-

* For example: In *Hilgreen* v. *Sherman's Cleaners & Tailors, Inc.*, 38 S. E. (2d) 252, 255, the Supreme Court of North Carolina upheld the jurisdiction of the superior court of that State to entertain such a suit under the Price Enforcement Act although it recently had denied the jurisdiction of a justice of the peace court so to do.

cise of its fundamental jurisdiction may not be prescribed by Congress.

Although, as stated by the Supreme Court of Illinois, petitioner there conceded that jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the action belongs, we submit that petitioner now confuses practice and procedure with fundamental jurisdiction and in his petition treats them interchangeably when he argues that because Congress cannot confer fundamental jurisdiction it cannot prescribe the procedure.

At page 18, petitioner, referring to the Seventh Amendment, says:

> "Under this provision Congress could not authorize Federal courts much less State courts to hear evidence and re-examine facts in jury cases for purposes of assessing damages."

The implication contained in that statement was fully met by this Court in the case of *Minn. & St. Louis Ry. Co.* v. *Bombolis,* 241 U. S. 211, 219, when it stated:

> "The proposition that as the Seventh Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress and regulate the enforcement of such right, but in substance creates a confusion by which the true significance of the Amendment is obscured. That is, it shuts out of view the fact that the limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore that its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States. * * *
>
> "* * * Thus, it is urged that if the limitation of the Amendment applies to Congress so as to prevent that body from creating a court and giving it power to act

> free from the restraints of the Amendment, it must also apply, unless the substance is to be disregarded and the shadow be made controlling, to the power of Congress to create a right and leave the power to enforce it in a forum to which the constitutional limitation is not applicable. But this again enlarges the Amendment by causing it not merely to put a limitation upon the power of Congress as to the courts, constitutional or otherwise, which it deems fit to create, but to engraft upon the power of Congress a limitation as to every right of every character and nature which it may create, or, what is equivalent thereto, to cast upon Congress the duty of subjecting every right created by it to a limitation that such right shall not be susceptible of being enforced in any court whatever, whether created by Congress or not, unless the court enforcing the right becomes bound by the restriction which the Amendment establishes."

This Court rejected the contention and affirmed the judgment of the State court of Minnesota based upon a jury verdict which complied with its laws, although it failed to meet the requirements of a valid verdict in the Federal courts.

The above decision also adequately meets the statement at the bottom of page 18 of the petition that the decision of the State court is probably not in accord with Article III, Section 1, of the Federal Constitution:

> "The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

At page 18, the petition asserts that, prior to the Rules of Civil Procedure, the Congress never regulated the practice of the Federal courts, which followed the State practice, and that prior to approval of the Price Control Act it did not attempt to regulate proceedings of State courts. As the Court knows, the Conformity Act had to do only

with pleadings and the rules of evidence and the general conduct of a trial, but was not and is not applicable to the jury procedure itself. The Court also knows that there are many acts of Congress, such as the Wage and Hour Act, which the State courts have concurrent jurisdiction to enforce and in which the increasing by the court of compensatory damages found by a jury, is either discretionary or mandatory.

Day v. *Woodworth,* 54 U. S. 363, and *Denver and Rio Grande Ry.* v. *Harris,* 122 U. S. 597, cited by petitioner at page 19, are of no help, because, first, the question of the right of the court to award exemplary damages was not involved; it was merely held that in certain tort actions, exemplary, as well as mere compensatory damages may be allowed, and therefore that instructions to the jury to that effect were proper; and, second, double or treble damages, such as provided by the Anti-Trust statutes, Wage and Hour laws, Patent laws, and the Price Enforcement Act are by their nature neither compensatory nor exemplary as those terms are employed in the common law.

Indeed, this Court held in *Teese* v. *Huntingdon, et al.,* 64 U. S. 2, in an action for infringement of a patent right, that the jurors are only required to find the actual damages incurred by the plaintiff at the time a suit was brought, and if in the opinion of the court the defendant has not acted in good faith, or has caused unnecessary expenses and injury to the plaintiff, the court may render judgment for a larger sum not exceeding three times the amount of the verdict. See also: *Birdsall* v. *Coolidge,* 93 U. S. 64.

We submit that there is no statute by which Congress has indicated an intention that the matter of multiplying damages should be left to the jury. On the contrary, all of its statutes on patents, trade-marks, wages and hours, the Sherman and Clayton acts, and the Price Control act, impose that duty upon the court.

III.

The Emergency Price Control Act, as Amended, and the Regulations Made Pursuant to the Authority Thereof, Gave Respondent the Right to Withhold Possession of the Premises After Expiration of the Lease so Long as He Tendered the Rent.

It is true, as stated in petitioner's point IX, that the Act provides that nothing therein contained shall be construed to require him to offer accommodations for rent.

It is equally true, however, that the Act provides for an administrator and, in Sections 902(b) and (d) U. S. C. A., permits the issuance of regulations concerning rents and evictions, and, in 924 (d) U. S. C. A., provides that no court except a special tribunal, to be known as the Emergency Court of Appeals, shall have power to consider the validity of any regulations.

The Administrator issued the Rent Regulations for Housing, which at all times in question were in effect in Chicago. Sections 2(a) and 4(a) prohibited the demand or receipt of rent for use or occupancy of housing accommodations after July 1, 1942, higher than the rent thereof on March 1, 1942, regardless of any lease or other agreement. Section 6 extensively regulates the removal or eviction of tenants. Section 6(a) prohibited the removal or eviction of a tenant, notwithstanding the expiration of his lease, so long as he pays the rent to which his landlord is entitled, except in certain specified cases not involved in the case at bar; and Section 6(b) requires that before proceeding in any other case the landlord must obtain the Administrator's approval by receiving an O. P. A. certificate or order. This regulation applies to any case in which the landlord wishes to withdraw the premises from the rental market.

The validity of Section 6(b) of the Regulations, as applied to cases in which the landlord no longer desires to offer accommodations for rent, has been upheld by the Emergency Court of Appeals in *Taylor* v. *Bowles,* 145 Fed. (2d) 833, 834; *Taylor* v. *Porter,* 156 Fed. (2d) 805, 810; and *Taylor* v. *Bowles,* 147 Fed. (2d) 824, 831.

The Emergency Court of Appeals, in holding said Regulation not to be in conflict with Section 4(d) of the Act, because the landlord on a proper showing might obtain an eviction certificate, said, in *Taylor* v. *Bowles,* 145 F. (2d) 833, at page 834:

> "However, the rent regulation from its first issuance has contained restrictions on eviction in the interest of affording tenants a measure of security. See Section 1388.1806, 7 F. R. 4915. * * * except in a few specified situations, it is provided that the landlord must first obtain authorization from the Office of Price Administration before proceeding to evict a tenant. Originally, one of the situations in which eviction was permitted without prior administrative authorization was where 'the landlord seeks in good faith not to offer the housing accommodations for rent.' Evidently this worked out unsatisfactorily, for a tenant, served with such an eviction notice, would not know whether he was obliged to comply with it or not, in the absence of a conclusive determination of fact as to whether the landlord had the *bona fide* intention of withdrawing the accommodations from the rental market. The regulation was therefore amended, effective October 20, 1942, by Supplementary Amendment No. 7 (7 F. R. 8505), so that a landlord wishing to withdraw his housing accommodations from the market could no longer proceed to evict his tenants without prior authorization by the Office of Price Administration. But the regulation as so amended does not conflict with Section 4(d) of the Act, for such a landlord upon a proper showing may obtain an eviction certificate from the Area Rent Director."

Petitioner did not and does not contend that under the Regulations, respondent was in any way at fault so as to enable petitioner to regain possession without an O. P. A. certificate. Indeed, the record shows that month after month respondent paid or tendered the maximum rent and thus kept himself within the coverage provided by the Regulations, that is to say, he had the right to continue in possession. Petitioner says that he wished to withdraw the premises from the rental market, but he concedes that he never obtained a certificate or order authorizing him so to do as required by the Regulations (R. 22). It follows that respondent's retention of possession was lawful and that the validity of the Regulation, so passed upon by the Emergency Court of Appeals, is not open to the question which he seeks to raise by his point IX.

Even if, under the Act, the question of the validity of the Regulations were open, the case of *Bowles* v. *Willingham*, 321 U. S. 503, 64 S. Ct. 641, is not in point, because it has to do merely with a suit for injunction to restrain violations of the Regulations. It did not involve removal of accommodations from the rental market and did not consider the proper procedure therefor. In that case, at 64 S. Ct. 648, the Court merely observed parenthetically:

> "We are not dealing here with a situation which involves a taking of property. *Wilson* v. *Brown, supra.* By Section 4(d) of the Act it is provided that 'Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodation for rent.' There is no requirement that the apartment in question be used for purposes *which bring them under the Act.*" (Italics ours.)

It is true, of course, that nothing contained in the Price Control Act compels an owner to bring the property under the Act by renting it in the first instance, but it is certainly true that if an owner elects to rent his property

and thus to bring it under the Act, as petitioner did, it thereupon becomes subject to all of the Regulations.

It is, therefore, manifest that respondent's continued possession of the premises after the expiration of his lease was not unlawful as petitioner contends, and that the Illinois Supreme Court was correct in holding that the Act and the Regulations were designed and expressly intended, among other things "to freeze" the occupancy of premises in controlled areas and "that the landlord here was in the company of thousands of others who had tenants who could lawfully occupy as long as they paid the rent" (R. 64).

IV.

Respondent Paid an Overcharge of Rent for the Use and Occupancy of Residential Property. Such Use and Occupancy Was Not in the Course of Any Trade or Business. Accordingly, Respondent May Recover Even if Such Payment Was Made Knowingly and Without Compulsion and Regardless of His Motives. The Offense Lies in the Landlord Demanding or Receiving More Than the Maximum Rent. It Is Not a Violation for the Tenant to Pay More Than the Ceiling.

Under this point we answer petitioner's points X and XI.

At the outset, we wish to suggest that an effective rent control program cannot exist if a landlord can decide not to renew a lease and thereafter collect, under the guise of damages or otherwise, more than the legal maximum rent otherwise allowable. Yet, this is in substance what petitioner did.

As we have shown in the preceding point, respondent's retention of possession was lawful. He, therefore, owed petitioner but $125.00 per month. Petitioner, nevertheless,

demanded and received from respondent $2,320.00, which was $1,320.00 in excess of the maximum for the period possession was retained. Accordingly, contrary to the Act and to the Regulations, petitioner demanded and received as rent for the use and occupancy of residential premises an overcharge of $1,320.00, and that is all that is required to support respondent's action and judgment.

Throughout the proceedings below, but not in this Court, petitioner strenuously contended that he had demanded and received the $2,320.00, not for rent, but as liquidated damages under the provisions of the lease. The Supreme Court of Illinois held that respondent was "a tenant against the will of the landlord by reason of the provisions of the statute" and that it made no difference under the Act what the payment was called, since "rent" is defined "as the consideration demanded or received in connection with the use or occupancy of any housing accommodations". It further held the said provision of the lease to be inconsistent with the Regulation "that the same rent be charged for the overtime as that regularly reserved", and consequently ineffective. It said it would be a mere play upon words to say that the payment was for liquidated damages, when the "daily amount accrues from use or occupation" as it did under the void lease provision relied upon by petitioner.

Petitioner here renews his contention that the payment was made for profit and thus in the course of trade or business. Petitioner, however, overlooks the fact that the statute provides merely that a person who buys a commodity for use and consumption, other than in the course of trade or business, may bring such an action. It expressly makes the payment or receipt of rent the buying or selling of a commodity. When a tenant pays rent for premises used as a home and not for a business, he may maintain an action whatever other motive he may have had, and that is what respondent did.

The circumstance that payment was not made until six months after possession had been surrendered, does not alter the fact that it was made for use and occupancy of residential premises. The record shows that the occasion for making it at that time, after all prior tenders of ceiling rent had been refused, was that petitioner had just filed his brief on an appeal from an order of the lower court denying him recovery under the lease provision for liquidated damages, and it was hoped that further expense of that appeal to respondent could be avoided. Neither the Act nor the Regulations limit recovery to overcharges paid during the tenant's actual possession. The Emergency Price Control Act, as amended, 50 U. S. C. A. App. Sec. 942(g), Rent Regulations for Housing, as amended, 10 F. R. 13528 Sec. 13(a) (10).

The facts which led to the overpayment, omitted in the petition, but which we have supplied, show that the overpayment was made under pressure of petitioner's unlawful and aggressive demands and for the purpose of stopping or minimizing the expenses to which respondent was thereby being subjected through numerous proceedings brought by petitioner as part of his campaign to get excess rent and possession in utter defiance of the Act and Regulations.

Recovery under the Act and the Regulations is not limited to cases in which an overcharge is paid under duress. If recovery were so limited, the objectives of the Act would seldom be attained. If, however, duress be a condition to recovery, then it existed on the facts at bar.

Neither motive, nor knowledge by the tenant that the payment is excessive, is material under the public policy of this Act. In holding motive to be immaterial, the Supreme Court of Illinois was merely following the great weight of existing authority on the point, including the following cited in respondent's briefs in that court: *Kenny*

v. *Hood* (1946 C. C. A.), 158 Fed. (2d) 226 (even though the sale was the result of plaintiff's fraud or of mutual mistake); *Gilbert* v. *Thierry*, 58 F. Supp. 235 (affirmed in 147 Fed. (2d) 603 (C. C. A. 1) (recovery had even though landlord acted innocently, tendered restitution and recovery might give a "windfall to persons with malevolent or disagreeable motives"); *Porter* v. *Crawford & Dougherty Foundry Co.*, 154 Fed. (2d) 431, 434 (C. C. A. 9) (recovery affirmed even though purchaser "joyfully may have aided the seller in violating the law"); *Zwang, et al.* v. *A. & P. Food Stores*, 46 N. Y. S. (2d) 747 (notwithstanding the general "judicial aversion to aiding a malefactor in the profiting from his own wrong" since "the consumer-purchaser commits no offense * * * when he pays an excessive price"); *Bowles* v. *Indianapolis Glove Co.*, 150 Fed. (2d) 597, 601 (C. C. A. 7) (although seller acted in reliance on conduct of the Administrator inducing sales at prices charged); *Beasley* v. *Gottlieb*, 42 A. (2d) 305 (N. J.) (notwithstanding seller's subsequent tender of return of the excess price); *Schaubach* v. *Anderson*, 36 S. E. (2d) 539 (Va.) (notwithstanding tenant knew that he was paying above ceiling rental); *Maitland* v. *Krieger*, 2 P. C. Para. 51858 (N. J. Court of Common Pleas, Essex County, Jan. 12, 1944) (although the amount was in dispute at the time of payment); *Greer* v. *Sims*, 1 P. C. Para. 51938 (Calif. Justice Court) (although tenant knowingly agreed to overpay, since it is the duty of court to enforce "though not in agreement or accord with many of the so-called 'emergency' laws"); *Bowles* v. *Leventhal*, 61 F. Supp. 144, 147 (N. Y.) (although sale actually rescinded); and *Bowles* v. *Hall*, 62 F. Supp. 486, 487 (Ky.) (although agreed if price thereafter found to exceed maximum, seller would refund overcharge).

In opposition to the foregoing authorities, petitioner cited the cases of *Trapp* v. *Great A. & P. Tea Co.*, 21 N. J.

Misc. 205, 32 Atl. (2d) 717; *Dunakin* v. *S. W. Co-op Assn.*, N. M. 69, 157 Pac. (2d) 243; and *Lightbody* v. *Russell*, 45 N. Y. S. (2d) 15, 293 N. Y. 492, which he relies on here. Even if those cases were in conflict with the authorities cited by respondent, the latter authorities would control because of their overwhelming weight. Actually, however, they are not in conflict.

In *Trapp* v. *Great A. & P. Tea Co.*, 32 Atl. (2d) 717, the Camden City District Court permitted recovery on the first purchase although the purchaser knowingly paid more than the ceiling since it was for her own use or consumption, but denied recovery on the two subsequent purchases which were not.

In *Dunakin* v. *S. W. Co-op Assn.*, 157 Pac. (2d) 243, the court exhaustively examined the evidence and came to the factual conclusion that the purchase involved was not for use and consumption.

In citing *Lightbody* v. *Russell*, 45 N. Y. S. (2d) 15, petitioner overlooked an intervening appeal to the Supreme Court Appellate Division (47 N. Y. S. (2d) 11) in which the court said at page 12:

> "The second defense that the plaintiff cooperated to violate the statutes and regulations in respect of ceiling prices of the tractor here involved and to induce the defendant to violate the same, is insufficient in law. * * * The plaintiffs may not under the present pleadings be deemed to be in *pari delicto* with the defendant and for that reason barred from invoking the right given by the statute to sue for treble damages."

It is no offense under the Act and Regulations to pay more than the ceiling. The offense is to demand or receive more. But there is no need or occasion for respondent to rely upon the letter of the law to sustain his judgment. It was not he who initiated the events which led

to the overpayment. For a limited time, until he could gain possession of the new home which he had purchased, he was lawfully retaining possession of petitioner's premises, only to be confronted with a barrage of actions initiated by petitioner, each of which, although successfully defended, caused expense, anxiety and concern. Even then, respondent did not attempt to entrap petitioner, nor in any way to lull him. On the contrary, when he did pay the overcharge claimed for the use and occupation of the premises as his home, he told petitioner that he would sue him, and petitioner clearly understood what he was told. Thus, respondent satisfied all ethical and equitable considerations, if they be in any way material. Before petitioner took the money he had been informed, through cases cited by respondent, that his lease provision for so-called liquidated damages was void, but his attitude was that they just couldn't do that to him, and he was determined to get the money, Act and Regulations to the contrary notwithstanding.

Conclusion.

The Supreme Court of Illinois was confronted with the important question as to whether the courts of this State are open for enforcement of Federal laws of the type at bar. It had to decide, too, whether the public policy declared by the Price Enforcement laws was to be recognized and enforced in this jurisdiction. We submit, that its decision gives full effect to the Law of the Land and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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